

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

UNITED STATES POSTAL SERVICE

and

STEFAN GUSTAF RONNKVIST, AN  
INDIVIDUAL, ET AL.

**Case Nos. 18-CA-142795, 16-CA-  
150064, 16-CA-161476, 15-CA-  
172429, 01-CA-169707, 16-CA-181-  
431**

**NATIONAL POSTAL MAIL HANDLERS UNION’S BRIEF IN OPPOSITION TO  
UNITED STATES POSTAL SERVICE’S EXCEPTIONS TO ADMINISTRATIVE LAW  
JUDGE’S DECISION**

Intervenor National Postal Mail Handlers Union (“NPMHU”), through undersigned counsel, submits this brief in opposition to the United States Postal Service’s (“USPS” or “Postal Service”) Exceptions to Administrative Law Judge Andrew Gollin’s May 19, 2017 decision (“ALJ Decision”) in the above-captioned matter. USPS urges in its Exceptions that the Board find Judge Gollin erred when he determined that USPS violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), in two ways: (1) by maintaining overbroad rules in employment handbooks which restrict activity protected under Section 7 of the Act, 29 U.S.C. § 157, and (2) by terminating an employee on the basis that he violated one of those handbook rules. As we explain in this Opposition Brief, the ALJ Decision correctly found that the handbook rules – Employee and Labor Relations Manual (“ELM”) § 667.2, Handbook AS-805 §

5-5.s, and Administrative Support Manual (“ASM”) § 663.4 – violate the NLRA and must be invalidated. USPS’s Exceptions should therefore be denied.<sup>1</sup>

## I. ARGUMENT

### A. *The Invalidated Policies*

The national USPS policies which Judge Gollin found to violate Section 8(a)(1) of the Act are:

- ELM 667.2 – Interception of Oral or Wire Communications by Postal Employees
  - 667.21 Prohibition
    - During the course of activities related to postal employment, postal employees may not record, monitor, or otherwise intercept the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, nor listen in on a telephone conversation, nor direct another employee to do so, unless all parties involved in the communication are made aware of and consent to such interception.
  - 667.22 Exceptions
    - This prohibition does not apply to postal inspectors or Office of Inspector General investigators while acting in the course of their official duties, nor does it apply to authorized personnel conducting “Compliance and Monitoring” activities in accordance with Handbook AS-805, Information Security. All activity conducted in this area must be in accord with applicable federal statutes governing the interception of wire or oral communications by law enforcement officers. Call monitoring programs may be established by postal management for legitimate business purposes, such as quality assurance and training. Call monitoring programs must comply with any applicable federal statutes and regulations.
  - 667.23 Definitions
    - For the purposes of 667.2, the terms *oral communication*, *wire communication*, *intercept*, and *electronic, mechanical, or other device* have the meanings used in 18 U.S.C. 2510.

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<sup>1</sup> In its exceptions to Judge Gollin’s finding that USPS violated the Act by terminating Bruce Freeman, USPS does not dispute that Freeman was terminated pursuant to one of the invalidated work rules, ELM § 667.2. Therefore, because, as we explain, USPS’s Exceptions fail to persuade that Judge Gollin erred when invalidating ELM § 667.2, USPS’s application of ELM § 667.2 to terminate Freeman also violated the Act.

- Handbook AS-805 section 5-5 – Prohibited Uses of Information . . .
  - Generally prohibited activities when using information resources include, but are not limited to, the following: . . .
    - s. Using unauthorized webcams, cameras, cell phones with cameras, or watches with cameras (and other personal imaging devices) in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas unless approved by area or headquarters vice president or designee for business purposes. (See Management Instruction AS882-2007-6, Postal Service Use of Retail and Cell-Phone Cameras, on the use of handheld and cell phone cameras.)
- ASM 663.4 – Permission Requests
  - Any Postal Service employee receiving a request from an individual, business, or other organization to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials such as photographs, stamps, or other images, or a request to create images of Postal Service structures, employees, operations, or murals or the like must direct the request to Integration and Planning for consideration and handling. Information about the program can be found at [www.usps.com/rightsandpermissions](http://www.usps.com/rightsandpermissions). All requests for permission must be submitted using the Rights and Permissions application found at [www.usps.com/rightsandpermissions](http://www.usps.com/rightsandpermissions). . . .
  - 663.42 Permission to Film and Photograph Postal Property
    - 663.421 Written Permission Required
      - Before giving individuals, businesses, media entities, or other entities access to Postal Service vehicles or Postal Service premises to film or take photographs, an employee must confirm that Integration and Planning has granted written permission to do so.

*B. Judge Gollin Correctly Found That ELM § 667.2 and AS-805 § 5-5.s Unlawfully Restrict Protected Section 7 Activity*

Judge Gollin correctly found that the USPS policies set forth in ELM § 667.2 and AS-805 § 5-5.s violate the NLRA under the National Labor Relations Board’s (“NLRB” or “Board”) holding in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015). In *Whole Foods*, the Board found that a company policy which prohibited employees from “record[ing] conversations with a tape recorder or other recording device” absent prior approval, 363 NLRB at \*1, would “reasonably be construed by employees to prohibit Section 7 activity,” *id.* at \*3. This is because, *Whole Foods* reasoned, photography and audio or video recording may be used, for example, to

record protected picketing, to document unsafe workplace equipment or hazardous working conditions,<sup>2</sup> to publicize communications regarding terms and conditions of employment, to record evidence for later use in grievances or hearings, and to document inconsistent application of employer rules. *Id.* Finding that maintenance of rules against photography and recording violated Section 8(a)(1) of the NLRA, the *Whole Foods* Board ordered that the employer rescind the violative rules. *Id.* at \*5. The USPS’s recording rules are indistinguishable from those in *Whole Foods*; the remedy here must be the same, as well. Judge Gollin was therefore correct to find that the NLRA requires rescission of ELM § 667.2 and AS-805 § 5-5.s.

The Postal Service’s Exceptions urging reversal of Judge Gollin’s finding fail to persuade. In its Exceptions, the USPS contends that Judge Gollin “read the regulations in isolation and disregarded relevant context.” USPS’s Exceptions at 27. In particular, USPS contends that it has “unique and weighty interests,” such as protecting its employees’ privacy and “confidentiality during the EEO process,” USPS’s Exceptions at 17-18, the “physical-security” of USPS’s facilities and distribution and retail network, *id.* at 23-24, USPS’s “information-security,” *id.* at 28-29, and the “privacy and safety of the public,” *id.* at 22-23.

The Board in *Whole Foods* rejected the first three types of rationales when proffered in that case. *Whole Foods* at \*4 (rejecting argument that the recording rules were meant to encourage open communication, protect the employer’s business strategy and trade secrets, and preserve employee privacy). And the fourth proffered basis, protection of postal customers’ privacy, is insufficient to justify the broad prohibition on recording set forth in ELM § 667.2 and

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<sup>2</sup> Indeed, Case No. 01-CA-169707, one of the consolidated cases in this matter, involves a charge filed by NPMHU Branch 83, Local 301 alleging that the Postal Service “has maintained an unlawful rule prohibiting the Union and its members from taking photographs and other recordings of hazardous working conditions.” General Counsel Exhibit 1(kk).

AS-805 § 5-5.s. After all, if the USPS wanted to protect customer information, it could specifically prohibit the photographing or video recording of mail pieces which identify customer information instead of imposing a general ban on *all* photographing or video recording. And, of course, prohibiting audio recording is unlikely to protect any customer information, except to the extent postal employees are recorded speaking customer addresses aloud.

Thus, USPS has failed to demonstrate that Judge Gollin erred by finding that the prohibitions in USPS's recording regulations were not "narrowly tailored." USPS's Exceptions at 34 (quoting ALJ Decision at 14:11-13; 15:30-31; 16:24-26). Nor has USPS shown that Judge Gollin misread *Flagstaff Medical Center*, 376 NLRB No. 65 (2011), *enf'd in part*, 715 F.3d 928 (D.C. Cir. 2013), in which the Board upheld a no-photography rule in a hospital, when he determined that the USPS rules could be distinguished from the rule in *Flagstaff*. As Judge Gollin noted, the rule at issue in *Flagstaff* was adopted by the employer in response to an instance where patients of the hospital were photographed – the rule's adoption, then, was understood by the employees of the hospital to be directly related to the protection of patient privacy, not a prohibition of protected activity.

USPS's contention that Judge Gollin erred by reading AS-805 § 5-5.s "more broadly than its text required," also is incorrect. USPS argues in its Exceptions that, in considering the areas in which recording is prohibited under that handbook provision – "restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas" – Judge Gollin improperly determined that "[t]he phrase 'Postal Service area' is not defined, and it reasonably could be interpreted as encompassing all Respondent-controlled property, such as offices, meeting rooms, break rooms, parking lots, and more." USPS's Exceptions at 30 (quoting ALJ Decision at 15:14-15:20). USPS's position is that Judge Gollin should have applied the

interpretive canon of *ejusdem generis* to find that “other Postal Service areas” encompasses places like those set forth ahead of the catch-all provision or, as USPS describes them, “only other areas where photography could expose sensitive information.” *Id.* But this discussion misses the point: even under USPS’s preferred reading of AS-805 § 5-5.s, the handbook provision prohibits recording and photography in an enormous amount of the workplace such that employees would be unable to, for example, take photographs of unsafe workplace equipment or hazardous working conditions. *See Whole Foods* at \*3. Thus, as we have explained, AS-805 § 5-5.s is overbroad because it prohibits *all* photography and video recording in the areas where it applies.

Because ELM § 667.2 and AS-805 § 5-5.s restrict postal employees’ Section 7 rights and the USPS has presented no overriding interest which would justify the restrictions, the Postal Service has failed to show that Judge Gollin erred in finding maintenance of those rules violates Section 8(a)(1) of the Act.

*C. Judge Gollin Correctly Found That ASM § 663.4 Unlawfully Restricts Protected Section 7 Activity*

Judge Gollin found that, as written, ASM § 663.4 may be read to require that an employee or union obtain permission from USPS before using its logos or trademarks in activities protected by Section 7 – for example, by using signs bearing USPS logos in a protest – and that, as such, the rule violates Section 8(a)(1) of the NLRA. ALJ Decision at 16; *see Pepsi Cola Bottling Co., Inc.*, 301 NLRB 1008, 1020 (1991) (“[T]he Company has not provided any business reason which would outweigh the Section 7 right of its employees to engage in union activity in a uniform bearing a product identification.”), *enfd.* 953 F.2d 638 (4th Cir. 1992). The

Postal Service contends in its Exceptions brief that unions and employees have not been made to request permission pursuant to ASM § 663.4 to use USPS trademarks, USPS's Exceptions at 33, but this argument does not save the rule given that its plain language may be understood to restrict Section 7 rights. USPS has thus failed to demonstrate that Judge Gollin erred in finding that the maintenance of ASM § 663.4 violates the Act.

## II. CONCLUSION

For the reasons stated, USPS has failed to show that Judge Gollin's Decision was in error. NPMHU therefore respectfully requests that USPS's exceptions be denied.<sup>3</sup>

Respectfully submitted,

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<sup>3</sup> Should the Board deny USPS's Exceptions and agree with Judge Gollin's decision, the Postal Service will have the ability under Article 19 of its collective bargaining agreements to reissue these rules and handbooks in a manner that would not run afoul of its employees' Section 7 rights. In particular, Article 19 provides a procedure by which USPS may propose new rules and the unions may call for face-to-face meetings and, if necessary, arbitration regarding the proposed rules.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Post-Hearing Brief of the National Postal Mail Handlers Union was E-filed with the NLRB E-Filing System and served via email and first class mail on the 21<sup>st</sup> day of July, 2017, on the following:

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